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TRANSCRIPT OF RECORD.

163-704

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 236.

WILLIAM H. SMITH, PLAINTIFF IN ERROR,

vs.

BENJAMIN SELLECK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED MAY 20, 1893.

(15,324.)

transcript and record of said cause, and that the same, when so received and filed, may be consolidated with the cause as already pending in this Court, to the end that both may be tried at one and the same time, and all questions involved may be settled.

CHARLES J. HUGHES, JR.
TYSON S. DINES,
Attorneys for Petitioners.

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1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA, }
Eastern District of Wisconsin, } ss:

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee, in said district, on the first Monday (being the second day) of January, A. D. 1893—present, the Honorable James G. Jenkins, circuit judge, presiding—among other the following proceedings were had, to wit:

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK, Impleaded, &c. } At Law.

Be it remembered that heretofore, to wit, at a stated term of said court, begun and held according to law at said city of Milwaukee on the first Monday (being the sixth day) of October, A. D. 1884—present, the Honorable Charles E. Dyer, district judge, presiding—and on the first day of said term, to wit, on the sixth day of October, A. D. 1884, the following proceedings were had, to wit:

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK & NATHANIEL SELLECK. } At Law.

This day came the defendant Benjamin Selleck, by his counsel, Messrs. Quarles, Spence and Richards, and presented to the court copies of the process, complaint, and other papers in this cause certified from the circuit court for Door county, in this district,
2 including copies of the petition of said defendant for the removal of the case to this court, and also of his bond required by law therefor; whereupon it is ordered by the court that the said copies be filed, and that the cause be entered on the law docket of this court and be proceeded with in the same manner as if it had been commenced here by original process.

Which certified copies are as follows:

Circuit Court, Door County.

WILLIAM H. SMITH, Plaintiff,
vs.
BENJAMIN SELLECK & NATHANIEL SELLECK, Defendants. }

The State of Wisconsin to the said defendants and each of them:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your

failure so to do judgment will be rendered against you according to the demand of the complaint; the sum to be demanded by the complaint in this action is six thousand dollars.

MYRON A. BAKER,
Plaintiff's Attorney.

P. O. address, Kenosha, Kenosha Co., Wis.

STATE OF WISCONSIN, } ss:
County of Kenosha, }

I hereby certify and return that I did on the 9th day of June, A. D. 1884, at the town of Pleasant Prairie, in said county of Kenosha, personally serve the within summons on the within-named defendant, Benjamin Selleck, by reading the same to him and giving him a true copy thereof, which said copy I delivered to
3 def't within, and that I was unable to find the other defendant, Nathaniel Selleck, in my county, and that he has no place of abode in said county.

June 9th, 1884.

W. L. DEXTER, *Sheriff,*
By MICHAEL HARKNESS, *Deputy.*

My fees, 2.40, paid by pe'ff's att'y.

Endorsed: "Office of clerk circuit court, Door county, Wis. Filed August 12, 1884. Allen Higgins, clerk."

STATE OF WISCONSIN:

Circuit Court of Door County.

WILLIAM H. SMITH
against
BENJAMIN SELLECK and NATHANIEL B. SELLECK.

The above-named plaintiff, by Myron A. Baker, his attorney, complains of Benjamin Selleck and Nathaniel B. Selleck, who are citizens of the State of Connecticut, and says:

I.

That on the 19th day of September, A. D. 1873, one Levi M. Griswold made and executed his note in writing, commonly called a promissory note, by which note the said Levi M. Griswold promised on or before the expiration of one year after said date to pay to the order of Nichols and Fitch, at the Franklin bank, the sum of two thousand five hundred and fifty dollars, with interest at ten per cent., which note the said Levi M. Griswold then and there delivered to said Nichols and Fitch; the consideration of said note was a portion of the purchase price of and was then secured by an incumbrance known as a trust deed upon certain 17 lots of land in Phares' subdivision, said lots being more fully described as follows, to wit:

Lots numbered seven (7), eight (8), nine (9), ten (10), and
4 eleven (11), in block eleven (11), and lots numbered nineteen (19), twenty (20), twenty-two (22), twenty-three (23), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), and forty-two (42), in block twelve (12), in Phares' subdivision of the east half of the southwest quarter of section twelve (12), town. thirty-eight (38) north, range — (13) east, of the third principal meridian, in the county of Cook and State of Illinois; and afterward and before the said note became due the said Levi M. Griswold, by the name and style of L. M. Griswold, and Anne T. Griswold, his wife, sold and conveyed the said above-described lots so encumbered to the defendants, and as a part of the consideration for such sale and conveyance the defendants then and there agreed in writing under seal with said Levi M. and Anne T. Griswold to assume and pay said encumbrance, to wit, said sum of twenty-five hundred and fifty dollars, mentioned in said note, a copy of which said agreement is hereto attached, marked Exhibit "A," and made a part hereof; and by means of the premises the defendants then and there became liable to pay said sum according to the tenor of said note to the owner and holder thereof whenever it should become due.

II.

That said note became due on the 19th day of September, A. D. 1874, and before the commencement of this suit the plaintiff became, ever since has been, and now is the owner and holder of said note, and the same has not been paid.

III.

That there is now due and unpaid on said note the sum of twenty-five hundred and fifty-dollars, with interest thereon from the 19th day of September, A. D. 1873, at ten per cent. per annum, less the sum of twelve hundred dollars, paid thereon on the 10th day of September, A. D. 1881, by a sale of the above-described premises.

IV.

5 Therefore the plaintiff demands judgment against the defendant for the sum of twenty-five hundred and fifty dollars, with interest thereon at ten per cent. per annum from the 19th day of September, A. D. 1873, and for his costs and disbursements in this action less the sum of twelve hundred dollars paid as aforesaid.

MYRON A. BAKER,
Plaintiff's Attorney.

EXHIBIT A.

This agreement made and entered into this third day of February 1874, between L. M. Griswold and Anna T. Griswold his wife of the city of Chicago, county of Cook and State of Illinois, parties of the first part, and Benjamin Selleck and N. B. Selleck of Danbury,

Connecticut by W. B. Selleck of Kenosha county, Wisconsin their attorney-in-fact, party of the second part, witnesseth:

That said parties of the first part, for and in consideration of the sum of seventy-one thousand six hundred dollars ($71,600) to be paid as hereinafter mentioned hereby agree to convey to said Selleck by warranty deed giving good title to the same all the following-described real estate, to wit: Lots five (5) to thirty-nine (39) block eight (8) (both inclusive) and all of block nine (9) in Woodbury's subdivision of the E. ½ of S. W. ¼ of S. W. ¼ of sec. 22 T. 40 N. R. 13 E. 3rd P. M. being eighty-three (83) lots according to recorded plat of same. Also the north 90 feet of lots 69, 70, 71 & 72 of Hayes Shelby and May office subdivision of block 46 C. F. subdivision of sec. 7, T. 39 N. R. 14 E. with the buildings thereon; also 12 & 13 in the subdivision of lots 1, 2 & 3 of block 49 C. T. subdivision of sec. 7, 39 14; also the seventeen (17) lots in Phares' subdivision owned by said L. M. Griswold, and said W. B. Selleck hereby agrees to
6 pay for said above-described property as follows by warranty deed, giving good title to the same, the following-described property, to wit: The pine lands known as the Gilbert Hart & Co. tract containing about 1,055 acres and lying about six miles S. W. from Egg Harbor. Also about 280 acres known as the Gorge place or farm and lying about 1½ miles south of Fish Creek village, the same being formerly owned by M. H. Stevens. Also about 600 acres of cedar and hardwood land purchased by W. B. Selleck of the State of Wisconsin and others and lying about two miles S. E. of Fish Creek; also lots 1, 2, 3, 4, 5 6 & 8 and the mill lot in fractional block 13. Containing saw-mill dock and other and all the buildings thereon belonging and situated in the village of Fish Creek as platted by Asa Thorp, also the tools belonging to the blacksmith's shop and mill, boom sticks with chains belonging to the same. The whole of the above property formerly owned by said Selleck, and lying and being in Door county, Wisconsin, and valued at seventy-one thousand six hundred dollars ($71,600). And said Selleck further agrees to assume the encumbrances now on said Griswold's property, the same being described as follows: Sublots 12 & 13 in the subdiv. of lots 1, 2 & 3 6, 7 sub. sec. 7, T. 39, R. —. Namely the sum of ($10,000) on the Lake St. property said Griswold to pay interest and taxes to date thereon.

And the sum of seven thousand dollars ($7,000) with accrued interest thereon since 26th M'ch 1873, and a lien of ($225) also said property being situated on Lincoln St. S. E. cor. Walnut—north 90 feet of lots 69, 70, 71 & 72 Hays Shelby & May offices sub. b'k 46 C. T. sub'n said Selleck to pay all taxes on said property subsequent to the year 1871. Also the sum of $140.62½ on each and every lot in Woodbury's sub'n now purchased by said Selleck half the accrued interest to be paid by said Selleck also all taxes subsequent to the year 1872, also the sum of twenty-five hundred and fifty dollars ($2,550) with accrued interest and taxes thereon on
7 said lots in Phares' subdivision. Each of the above parties to furnish abstract of title to date, and papers to be passed or before twenty days from date or as soon thereafter as abstract can

be furnished and good title shown to all the above-described property; and it is further agreed by and between the aforementioned parties that if the said Selleck shall fail to convey the above-described quantity of cedar and hardwood lands in Door county, said lands being valued herein at 2.00 per acre, then the amount short shall be made good to said Griswold out of the lots in Woodbury's subd'n at five hundred dollars each and it is further agreed that said Selleck shall furnish the sum of twenty-five hundred dollars ($2,500) to said Griswold or allow said Griswold to borrow the same on the Lake-street property aforementioned for a term not exceeding six months and said Griswold shall give said Selleck an incumbrance back on said Fish Creek property as security for said $2,500, or pay same back with interest as agreed. It is estimated that above-described pine lands will cut ten million ($10,000,000) feet of good pine lumber and it is agreed by and between the parties contracting, that said first party is within thirty days from this date to view said pine lands and in case he estimates the quantity of lumber thereon at less than herein estimated then the said parties are within 40 days from this date to select one disinterested person and said persons are together to view and to estimate the quantity of said pine and in case they cannot agree on the amount then they are to select a third party who shall with them view the said pine and estimate the quantity thereof, and the decision of the three shall be final, and should said lumber fall short as estimated by said viewers of the amount herein estimated to the amount of over two million feet, then this contract shall be null and void, but if the said estimated shortage is less than two million feet lumber then said second party shall make such shortage good by lots in Woodbury's subdivision at prices taken by him valuing the lumber at $2.00 per thousand, stumpage in case of either party failing to fulfil the above agreement then the party so failing shall pay the amount of three thousand dollars ($3,000) for damages and commissions.

It is further agreed that this contract shall not be recorded by either party.

In witness whereof we the aforementioned parties have hereunto set our hands and seals the day and year first above written.

L. M. GRISWOLD, [SEAL.]
ANNE T. GRISWOLD, [SEAL.]
BENJ. SELLECK & N. B. SELLECK, [SEAL.]
By W. B. SELLECK, *Their Att'y-in-fact.*

Witnessed by—
A. F. HOLMES.
E. A. LUND,
(As to L. M. Griswold & Benj. Selleck & N. B. Selleck.)
H. A. JACKSON,
Witness to the signature of Ann T. Griswold and the other contracting parties.

Endorsed: Due service of a copy of the within complaint on us this 8th day of July, 1884, is hereby admitted. Quarles, Spence and Richards, att'ys for def't Benjamin ——. Myron A. Baker, Kenosha, att'y for pl'ff. Office of clerk circuit court, Door county, Wis. Filed Aug. 12, 1884. Allen Higgins, clerk.

STATE OF WISCONSIN:

Door County Circuit Court.

WM. H. SMITH
against
BENJAMIN SELLECK, Impleaded with Another, as Defendant.

We, William A. Smith, as principal, by Edwin A. Sherburne, his attorney-in-fact, and George R. Lampard, as surety, do hereby undertake, according to the statute in such cases made and provided (to wit, section 2946 of chapter 129, Revised Statutes of Wisconsin of 1878), that the plaintiff in the above action will pay on demand all costs that may be awarded to the defendant Benjamin Selleck in said action in any court not exceeding two hundred and fifty dollars.

August 7, A. D. 1884.

WILLIAM H. SMITH, *Plaintiff*,
By EDWIN A. SHERBURNE,
His Att'y-in-fact.
GEORGE R. LAMPARD.

STATE OF WISCONSIN, } ss:
Winnebago County, }

George R. Lampard, being first duly sworn, says that he resides in Oshkosh, in the State of Wisconsin, and is a freeholder in said town and State; that he is the person named in the above undertaking as surety, and that he is worth double the amount named in the foregoing undertaking, to wit, five hundred dollars, over and above all his debts and liabilities, in property in the State of Wisconsin not by law exempt from execution.

GEORGE R. LAMPARD.

Subscribed and sworn to before me this 7th day of August, 1884.
THOS. D. GRIMNER,
Clerk Circuit Court, Winnebago County, Wis.

Endorsed: "Office of clerk circuit court, Door county, Wis. Filed Aug. 12, 1884. Allen Higgins, clerk."

Circuit Court, Door County.

WILLIAM H. SMITH, Plaintiff,
vs.
BENJAMIN SELLECK, Impleaded, &c., Defendant.

Please take notice that the above-entitled action will be brought to trial and an inquest taken therein at the next regular term of

the aforesaid court, to be held at the court-house, in the village of Sturgeon Bay, in said county of Door, on the 2nd day of
10 September next, at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated August 19th, 1884.

Yours, &c., MYRON BAKER,
Plaintiff's Attorney.

To Messrs. Quarles, Spence & Richards, att'ys for def't, Benj. Selleck.

Service of a copy of above notice admitted this 19th day of August, A. D. 1884.

QUARLES, SPENCE & RICHARDS,
Att'ys for Def't, Benj. Selleck.

Issue of fact for jury.
Joined Aug. 18, 1884.
Filed by pl'ff's att'y Aug. 25, 1884.

ALLEN HIGGINS, *Clerk.*

THE STATE OF WISCONSIN:

Circuit Court, Door County.

WILLIAM H. SMITH, Plaintiff,
vs.
BENJAMIN SELLECK, Impleaded with NATHANIEL B. SELLECK.

To the Hon. Samuel D. Hastings, Jr., the judge of said court:

The petition of the defendant, Benjamin Selleck, above named, respectfully shows that he is a citizen of the State of Connecticut, and that the plaintiff is and at the commencement of this suit was a citizen of the State — Illinois; that the said Nathaniel Selleck, who has been impleaded with this petitioner, is also a resident of the State of Connecticut; that the above-entitled action was commenced by the service of summons, in Kenosha county, on the ninth day of June, A. D. 1884; that this action is brought to enforce and establish the liability of defendants to pay a certain promissory note of about $2,500 given by one Levi M. Griswold, which indebt-
11 edness, it is claimed, the defendants assumed; that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and that the next regular term of said court appointed to be held on the Tuesday after the first Monday of September, 1884, of said court is the first term of said court at which said cause could be tried, and that it has not yet been tried, and your petititioner herewith presents a bond with a good and sufficient surety for the entering at the next term of the circuit court of the United States for the eastern district of Wisconsin, on the first day of its next session, a copy of the record in the above-entitled cause, copies of said process against said defendants, and all of the pleadings, depositions, testimony, and other proceedings in the cause, and for the payment of all costs which may be awarded if said circuit court shall hold that this cause was wrong-

fully or improperly removed thereto, and also for their appearing and entering special bail in said suit if special bail was originally requisite therein, and your petitioner hereby offers to furnish such additional surety as this honorable court shall require.

Wherefore your petitioner prays this court to accept said petition and bond, and to proceed no further in this action pursuant to the provisions of the acts of Congress in that behalf.

BENJAMIN SELLECK.

Subscribed and sworn to before me this 16th day of August, A. D. 1884.

[NOTARIAL SEAL.] BENEZET A. HOUGH,
Notary Public.

Endorsed: "Office of clerk circuit court, Door county, Wis. Filed Sept. 1, 1884. Allen Higgins, clerk."

12 STATE OF CONNECTICUT, }
Fairfield County. }

COUNTY CLERK'S OFFICE.

I, David Booth, clerk of said Fairfield county and of the superior court in and for the said county, the same being a court of record, hereby certify that Benezet H. Hough, Esq., was on the 16th day of August, 1884, and now is a notary public within and for said county, duly appointed, commissioned, and sworn, having full power and authority by the laws of this State to take the acknowledgement of deeds for lands and other instruments and to certify the same, also to administer oaths, to take affidavits and depositions out of court, and to give certificates thereof; that full faith and credit may and ought to be given to his official acts and attestations; that I am acquainted with his handwriting and verily believe that the signature to the instrument hereto annexed purporting to be his is his genuine official signature, and that said instrument is executed and duly authenticated according to the laws of this State.

In testimony whereof I hereunto set my hand and
[SEAL.] affix the seal of said court, at Danbury, in said county and State, on the 18th day of August, 1884.

DAVID B. BOOTH, *Clerk.*

13 Know all men by these presents that we, Benjamin Selleck, of Danbury, Connecticut, and —— ——, of ——, are held and firmly bound unto William H. Smith, of Evanston, Illinois, in the sum of five hundred dollars, to be paid to the said William H. Smith, his executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals the — day of August, A. D. 1884.

Whereas the above-bounden Benjamin Selleck has petitioned the

circuit court of Door county, State of Wisconsin, for the removal of a cause therein pending wherein William H. Smith above named is plaintiff and Benjamin Selleck, impleaded with Nathaniel Selleck, is defendant, to the circuit court of the United States for the eastern district of Wisconsin, pursuant to the provisions of the acts of Congress in that behalf:

Now, therefore, the condition of the above obligation is such that if the above-bounden Benjamin Selleck shall enter in such circuit court, on the first day of its next session, a copy of the record in such suit, copies of the process against defendants and of all the pleadings, depositions, testimony, and all other proceedings in the cause, and shall pay all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in such suit if special bail was originally requisite therein, then this obligation shall be null and void; otherwise of force.

BENJ. SELLECK. [SEAL.]
D. HEAD. [SEAL.]

In presence of—
To first signature: DARIUS SELLECK.
DAVID B. BOOTH.

14 STATE OF WISCONSIN, *Kenosha County*, } ss:

I, Daniel Head, of Kenosha city, county of Kenosha and State of Wisconsin, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Wisconsin and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property exempt from execution.

D. HEAD.

Subscribed and sworn to before me this 23rd day of August, A. D. 1884.

MYRON A. BAKER,
Notary Public.

Endorsed: "Office of clerk circuit court, Door county, Wis. Filed Sept. 1, 1884. Allen Higgins, clerk."

Circuit Court, Door County.

WILLIAM H. SMITH, Plaintiff,
vs.
BENJAMIN SELLECK & NATHANIEL SELLECK, Defendants.

STATE OF WISCONSIN, *Door County*, } ss:

I, Allen Higgins, clerk of the circuit court in and for said county, do hereby certify that the annexed and foregoing are true copies of

all papers and pleadings which have been filed in my office in the above-entitled cause, and the same are hereby transmitted to the clerk of the circuit court of the United States for the eastern district of Wisconsin, pursuant to the direction of the attorneys for the def't Benjamin Selleck.

In testimony whereof I have hereunto set my hand and affixed the seal of this court this 17 day of Sept., A. D. 1884.

ALLEN HIGGINS, *Clerk.*

15 *Proceedings in U. S. Circuit Court.*

Nov. 23rd, 1886.—This day came the defendant, Benjamin Selleck, by his attorneys, and filed his answer as follows:

Circuit Court, Door County.

WILLIAM H. SMITH, Plaintiff,
vs.
BENJAMIN SELLECK, Impleaded with NATHANIEL SELLECK, Defendant.

Now comes the defendant, Benjamin Selleck, impleaded as aforesaid, by Quarles, Spence & Richards, his attorneys, and for a separate answer to the complaint herein alleges—

That he has no knowledge or information sufficient to form a belief as to whether one Levi M. Griswold executed the note and trust deed for $2,550 at the time and in the manner alleged in the first paragraph of the complaint or otherwise, nor whether such note was ever delivered to Nichols and Fitch, nor whether the same was a portion of the purchase price of certain lots purchased by said Griswold.

This defendant expressly denies that the lots or tracts of land described in the first paragraph of said complaint or any part thereof were ever conveyed by said Levi M. Griswold and Anne T. Griswold, his wife, to the defendants or to either of them. This defendant expressly denies that as a part of the consideration for the sale and conveyance of said lands or otherwise the defendants then or at any time agreed to pay said encumbrance or any part thereof; and defendant further denies that the defendants ever agreed to pay said note when the same should become due or otherwise.

Defendant admits that the written agreement attached to said complaint and marked "Exhibit A" was executed by one William B. Selleck, the agent of the defendants at or about the time it bears date, but this defendant avers that neither of defendants was

16 present at the time such paper was signed or had any knowledge concerning the same; that it was then and there distinctly understood and agreed by and between said Levi M. Griswold and said William B. Selleck that said William B. Selleck would not assume to conclude such trade or bind defendants thereby; that said agreement should be deposited before delivery

thereof with Ling & Holmes, in the city of Chicago, to remain until defendants or one of them should have an opportunity to come to Chicago, examine such property and such agreement, and that in no event should said contract have any validity until the same had been assented to and ratified by this defendant; that in pursuance of such stipulation said writing was deposited with said Ling and Holmes and was never delivered; that thereupon defendant did come to Chicago and did examine the terms of said writing and did ascertain the condition of the property referred to therein; and this defendant then and there expressly refused to assent to or ratify such bargain or such writing or any part thereof, and this defendant then and there so notified said Griswold and said Ling and Holmes; that thereupon said writing was abandoned and all negotiations for an exchange of property were terminated, and said writing never became a binding, operative contract.

That afterwards negotiations were renewed between said Griswold and this defendant, and certain of said Griswold's lands were received by the defendant in exchange for certain of the lands described in the complaint, but such exchange was effected by means of deeds mutually executed; that it was expressly and distinctly understood between the defendants and said Griswold at the time of the execution of such deeds and the exchange of such property that the defendants would not and did not assume and agree to pay any encumbrances on said Griswold's lands whatever, but that such exchange was made subject to certain encumbrances specified in the deeds, and said deeds so exchanged fully and fairly embraced the actual agreement between the said parties in that regard.

17 II.

And for a further and separate answer to said complaint this defendant avers that said plaintiff ought not to have or maintain this suit, for the reason that said supposed cause of action did not accrue within six years next preceding the commencement of this action.

And for further answer in this behalf this defendant denies each and every allegation of said complaint not herein expressly admitted or denied.

QUARLES, SPENCE & RICHARDS,
Att'ys for Defendant, Benj. Selleck, Impleaded.

And afterwards, to wit, at a stated term of said court, begun and held according to law at the city of Milwaukee on the first Monday (being the seventh day) of October, A. D. 1889, and on the first day thereof, to wit, on the seventh day of October, A. D. 1889—present, the Honorable James G. Jenkins, district judge, presiding—the following proceedings were had, to wit:

Motion to Remand.

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK, Impleaded, &c. } At Law.

This day came the plaintiff, by his counsel, Mr. Sherburne, and moved the court to remand this cause to the circuit court for Door county, Wis., and upon application of Mr. Quarles, counsel for the defendant, it is ordered by the court that the hearing of said motion be continued until Saturday, the 12th instant.

And afterwards, to wit, on the fourth day of said term, to wit, on the 12th day of October, A. D. 1889—present, the Honorable James G. Jenkins, district judge, presiding—the following proceedings were had, to wit:

18 *Order Overruling Motion to Remand.*

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK, Impleaded, &c. } At Law.

This day the motion of the plaintiff to remand this cause to the circuit court for Door county, Wis., came on to be heard and was argued by Mr. Sherburne in favor of the same and by Mr. Charles Quarles in opposition and submitted. On consideration whereof it is ordered by the court that said motion be and hereby is overruled, and upon application of the plaintiff it is ordered by the court that the cause be and hereby is continued.

And afterwards, to wit, at a stated term of said court, begun and held according to law at the city of Milwaukee on the first Monday (being the third day) of October, A. D. 1892—present, the Honorable James G. Jenkins, district judge, presiding—and on the twentieth day of said term, to wit, on the 14th day of November, A. D. 1892, the following proceedings were had, to wit:

Trial Commenced.

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK, Impleaded, &c. } At Law.

This day came the parties, by their counsel, Mr. E. A. Sherburne appearing for the plaintiff, and Mr. J. V. Quarles for the defendant, Benjamin Selleck, and the issue herein between the plaintiff and said defendant came on to be tried; whereupon a jury was called to try the same, who came, to wit, Uriah Grant, A. W. Straw, Henry Phillips, C. H. O'Neill, Lewis W. Dunkle, H. J. Smith, William H. Moore, Willard B. Ward, George E. Calhoun, Christian

Reinhard, R. B. McElroy, and E. H. Fuller, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded the same was adjourned until tomorrow morning.

19 November 15, 1892.—This day came the parties, by their counsel, and also the jurors of the jury, and the trial of the issue herein between the plaintiff and the defendant, Benjamin Selleck, was resumed, and not being concluded the same was adjourned until tomorrow morning.

November 16, 1892.—This day came the parties, by their counsel, and also the jurors of the jury, and the trial of the issue herein between the plaintiff and the defendant, Benjamin Selleck, was resumed, and not being concluded the same was adjourned until tomorrow morning.

November 17, 1892.—This day came the parties, by their counsel, and also the jurors of the jury, and the trial of the issue herein was resumed, and the jurors of the jury aforesaid, being charged by the court, retired to their room under the charge of a sworn officer to deliberate upon their verdict and with leave to bring in a sealed verdict tomorrow morning.

Verdict for Defendant.

November 18, 1892.—This day came the parties, by their counsel, and the jurors of the jury came into court and on their said oaths respectively do say that they find the issue herein in favor of the defendant, and came the plaintiff, by his counsel, and moved the court for a new trial for reasons filed, and, further, to remand this cause to the circuit court for Door county for want of jurisdiction of this court; which motion to remand is as follows:

Second Motion to Remand.

U. S. Circuit Court, Eastern District of Wisconsin.

W. H. SMITH
vs.
BENJAMIN SELLECK.

And now comes the said plaintiff, by E. A. Sherburne, his att'y, and moves the court to set aside the verdict and all proceedings in the above cause in this court and remand the cause to the circuit court of Door county for the reasons that this court has not nor ever has had any jurisdiction in this cause.

E. A. SHERBURNE,
Att'y for Pl'f.

20 And now, at this same term, to wit, January term, 1893, and on the fifty-fifth day thereof, to wit, on the 15th day of March, A. D. 1893, the following proceedings were had, to wit:

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK, Impleaded, &c. } At Law.

This day came the parties, by their counsel, Mr. Sherburne appearing for the plaintiff and Mr. J. V. Quarles for the defendant, Benjamin Selleck, and the plaintiff withdrew his motion for a new trial; whereupon the motion of said plaintiff to set aside the verdict and remand the case to the circuit court for Door county came on to be heard and was argued by said counsel and submitted, when the court took the same under consideration.

And afterwards, to wit, on the sixty-eighth day of said term, to wit, on the 3rd day of April, A. D. 1893, the following proceedings were had, to wit:

Order Allowing Amended Return to be Filed.

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK, Impleaded, &c. } At Law.

This day came the defendant, Benjamin Selleck, by his counsel, and on his motion and affidavit filed it is ordered by the court that leave be and hereby is granted him to file the certified copy of the petition for removal annexed to said motion this day filed and marked "Exhibit A," *nunc pro tunc*, as of the 6th day of October, 1884, and that the record of such removal now on file in this court be corrected to accord with the fact and to correspond with the record actually made in the circuit court for Door county by the substitution of said Exhibit "A" in the stead and place of the certified copy of such petition for removal filed herein on the 6th day of October, 1884.

Which motion, affidavit, and "Exhibit A" are as follows:

21 Circuit Court of the United States, Eastern District of Wisconsin.

WILLIAM H. SMITH, Plaintiff,
against
BENJAMIN SELLECK, Defendant.

To E. A. Sherburne, Esq., attorney of the plaintiff:

Please to take notice that on the third day of April, A. D. 1893, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the United States court-room, in the city of Milwaukee, the defendant, Benjamin Selleck, will move the court for leave to file the certified copy of the petition for removal which is hereto annexed, marked Exhibit "A," *nunc pro tunc*, as of the 6th day of October, 1884, and that the record of such removal now on file in this court be corrected to accord with the fact and to corre-

spond with the record actually made in the circuit court of Door county by the substitution of the said Exhibit "A" in the stead and place of the certified copy of such petition for removal filed with the clerk of this court on the 6th day of October, 1884, and for such other, further, and different relief in the premises as to the court may seem proper.

You are further notified that this motion will be based upon all the papers heretofore filed in this cause and all the proceedings heretofore had therein and upon the affidavit of J. V. Quarles, hereto annexed, and upon the certified copy of such petition for removal, hereto annexed, marked Exhibit "A," and made a part of this application.

Yours, &c.,

QUARLES, SPENCE & RICHARDS,
Att'ys for Defendant, Benjamin Selleck.

22 Circuit Court of the United States, Eastern District of Wisconsin.

WILLIAM H. SMITH, Plaintiff,
against
BENJAMIN SELLECK, Defendant.

MILWAUKEE COUNTY, *ss*:

Joseph V. Quarles, being duly sworn, on oath doth depose and says that he is one of the attorneys for the defendant, Benjamin Selleck, and has been in charge of this litigation, so far as this defendant is concerned, since the commencement of this suit.

That on or about the 16th day of August, 1884, this deponent prepared a petition for the removal of this cause from the circuit court of Door county to this court; that a true and correct copy of such petition for the removal so presented to said State court is hereunto annexed, marked Exhibit "A," and made a part of this application.

That when the record was made up by the clerk of said circuit court of Door county and transmitted to this court said clerk of Door county attached thereto what purported to be a certified copy of said petition for removal, but said clerk in making said certified copy omitted, by mistake, therefrom the words "and at the commencement of this action was" where the same occurred in the third and fourth line of said Exhibit "A," as will more fully and at large appear by the record in this case.

That said mistake of said clerk was not discovered or suggested until after the trial and verdict in this case; that thereupon deponent applied to the clerk of the circuit court of Door county to transmit to the clerk of this court a certified copy of said petition of removal as the same actually appears of record in said
23 circuit court of Door county and as the same was originally filed in said court.

That thereupon Allen Higgings, the clerk of said Door county

circuit court, did prepare said Exhibit "A," and did attach his certificate thereto, and did transmit the same to Edward Kurtz, Esq., the clerk of this court, and the same was duly filed by said clerk on the 28th day of March, 1893.

Deponent further shows that Nathaniel Selleck, whose name appears in the summons and complaint herein, was never served with process and never appeared in this cause.

J. V. QUARLES.

Subscribed and sworn to before me this 28th day of March, A. D. 1893.

KATHARINE M. REDFIELD,
Notary Public, Milwaukee County, Wis.

EXHIBIT "A."

THE STATE OF WISCONSIN:

Circuit Court, Door County.

WILLIAM H. SMITH, Plaintiff,
vs.
BENJAMIN SELLECK, Impleaded with NATHANIEL SELLECK.

To the Hon. Samuel D. Hastings, Jr., the judge of said court:

The petition of the defendant, Benjamin Selleck, above named respectfully shows that he is and at the commencement of this suit was a citizen of the State of Connecticut, and that the plaintiff is and at the commencement of this suit was a citizen of the State of Illinois; that said Nathaniel Selleck, who has been impleaded with this petitioner, is also a resident of the State of Connecticut; that the above-entitled action was commenced by the service of summons in Kenosha county on the ninth day of June, A. D. 1884; that this action is brought to enforce and establish the liability of defendants to pay a certain promissory note of about $2,500, given by one Levi M. Griswold, which indebtedness it is claimed the defendants assumed; that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and that the next regular term of said court, appointed to be held on the Tuesday after the first Monday of September, 1884, of said court, is the first term of said court at which said cause could be tried, and that it has not yet been tried; and your petitioner herewith presents a bond, with a good and sufficient surety, for the entering at the next term of the circuit court of the United States for the eastern district of Wisconsin, on the first day of its next session, a copy of the record in the above-entitled cause, copies of said process against defendants, and of all pleadings, depositions, testimony, and other proceedings in the cause, and for the payment of all costs which may be awarded if said circuit court shall hold that this cause was wrongfully or improperly removed thereto, and also for

there appearing and entering special bail in said suit if special bail was originally requisite therein, and your petitioner hereby offers to furnish such additional surety as this honorable court shall require.

Wherefore your petitioner prays this court to accept said petition and bond and to proceed no further in this action, pursuant to the provisions of the acts of Congress in that behalf.

BENJ. SELLECK.

Subscribed and sworn to before me this 16 day of August, A. D. 1884.

BENEZET A. HOUGH.
[SEAL.] *Notary Public.*

25 STATE OF CONNECTICUT, }
Fairfield County, }

COUNTY CLERK'S OFFICE.

I, David B. Booth, clerk of said Fairfield county and of the superior court in and for the said county, the same being a court of record, hereby certify that Benezet H. Hough, Esq., was on the 16 day of August, 1884, and now is a notary public within and for said county, duly appointed, commissioned, and sworn, having full power and authority by the laws of this State to take acknowledgements of deeds for lands and other instruments and to certify the same; also to administer oaths, to take affidavits and depositions out of court, and to give certificates thereof; that full faith and credit may and ought to be given to his official acts and attestations; that I am acquainted with his handwriting and verily believe that the signature to the instrument hereto annexed purporting to be his is his genuine official signature, and that said instrument is executed, acknowledged, and duly authenticated according to the laws of this State.

In testimony whereof I hereunto set my hand and affix
[SEAL.] the seal of said court, at Danbury, in said county and State, on the 16th day of August, 1884.

DAVID B. BOOTH, *Clerk.*

STATE OF WISCONSIN, }
Circuit Court, Door County, } *ss:*

I, Allen Higgins, clerk of said court, do hereby certify that I have compared the foregoing copy with the original petition for removal entered in the action entitled William H. Smith *vs.* Benjamin Selleck, impleaded with Nathaniel Selleck, and my certificate
26 thereto attached; that it is a correct transcript therefrom and of the whole thereof as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Sturgeon Bay, this 25 day of March, A. D. 1893.

ALLEN HIGGINS, *Clerk.*

And afterwards, to wit, on the seventieth day of said term, to wit, on the tenth day of April, A. D. 1893, the following proceedings were had, to wit:

Order Overruling Motion to Remand.

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK, Impleaded, &c. } At Law.

This day came the parties, by their counsel, and, on consideration of the motion of the plaintiff to remand this cause to the circuit court for Door county, it is ordered by the court that said motion be, and hereby is, overruled.

And afterwards, to wit, on the seventy-second day of said term, to wit, on the 20th day of April, 1893, the following proceedings were had, to wit:

Judgment.

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK, Impleaded, &c. } At Law.

This day came the defendant, by his counsel, and moved the court for judgment upon the verdict of the jury.

Whereupon it is considered and adjudged by this court, now here, that the plaintiff take nothing by his suit, and that the defendant, Benjamin Selleck, do have and recover of the said plaintiff, William H. Smith, one hundred and fourteen dollars and fifty cents, his costs about his said defense in this behalf by him expended, and that he have execution therefor.

Judgment-roll signed April 20th, A. D. 1893.

Costs, $114.50.

EDWARD KURTZ, *Clerk.*

27 April 27, 1893.—This day came the plaintiff, by his attorney, and filed his petition for a writ of error and his assignment of errors and also his bond in the sum of two hundred and fifty dollars, with Delia A. Lampard as surety, conditioned that he shall prosecute his writ of error to affect and answer all damages and costs if he fail to make his plea good; which bond is approved by the circuit judge; whereupon a writ of error and citation issued and a copy of said writ of error lodged for the defendant in error.

Which petition for writ of error, assignment of errors, and bond are as follows:

Supreme Court of the United States.

WILLIAM H. SMITH, Plaintiff in the Circuit Court and Plaintiff in Error,
against
BENJAMIN SELLECK, Impleaded with NATHANIEL B. SELLECK, Defendant in the Circuit Court and Defendant in Error.

In error to the circuit court of the United States, eastern district of Wisconsin.

Judgment for Costs in Favor of the Defendant, Benjamin Selleck, at the January Term, A. D. 1893.

And now comes the said plaintiff, William H. Smith, by Lysander Hill, his attorney, and respectfully prays the court to issue a writ of error to the circuit court of the United States for the eastern district of Wisconsin, returnable to the supreme court in the time provided by law.

WILLIAM H. SMITH,
By LYSANDER HILL,
His Attorney.

28 Supreme Court of the United States.

WILLIAM H. SMITH, Plaintiff in the Circuit Court and Plaintiff in Error,
against
BENJAMIN SELLECK (Impleaded with NATHANIEL B. SELLECK), Defendant in the Circuit Court and Defendant in Error.

Error to the circuit court of the United States, eastern district of Wisconsin.

Assignment of Errors.

And now comes the said plaintiff in error, William H. Smith, by Lysander Hill, his attorney, and says that in the record and proceedings aforesaid there is manifest error.

And in this behalf he shows the court here that the circuit court erred in overruling the motion made by the said plaintiff in error before the trial of the said cause in the said circuit court to remand the said cause to the circuit court of Door county, in the State of Wisconsin, because the said circuit court of the United States never had jurisdiction of the said cause, for the following reasons, to wit:

First.

Said cause was never removed to nor was it ever pending in the said circuit court of the United States, because—

a. No petition for "removal" of said cause from the said State court to the said circuit court of the United States was ever presented to or filed in the said State court.

b. The so-called "petition for removal" was never presented to nor was any action taken thereon by the said State court nor was any action asked of the said State court thereon.

c. No bond was ever presented to the said State court as required by the act of Congress when it is desired to remove a cause
29 from the State to the United States court, nor was any opportunity given to the said State court to approve or disapprove of or to accept or reject the so-called bond which was filed by the said defendant in error in the said State court.

d. The so-called bond which was filed in the said State court by the defendant in error had no surety named therein.

e. The citizenship of the parties to said action at the time of the commencement thereof and at the time of the filing of the said petition was not shown, either in the said so-called petition for "removal" nor elsewhere in the record, as required by the act of Congress.

f. The citizenship of the defendant Nathaniel B. Selleck at the commencement of the said action or at the time of the filing of the so-called petition is not shown in the said petition, nor elsewhere in the record.

g. The record shows that this is an action against two defendants on a joint liability, and that both of the said defendants were necessary parties and only one of the said defendants joined in the said petition.

h. No copy of the record of the said State court was ever entered in the said circuit court of the United States.

Second.

The said circuit court of the United States erred in denying the motion of the said plaintiff, made after the trial of the said cause, to set aside the verdict and all of the proceedings in the said circuit court of the United States in the said cause, render judgment against the said defendant, Benjamin Selleck, and remand the said cause to the said circuit court of Door county, Wisconsin, because, for the reasons above given, the said circuit court of the United States had not nor ever had jurisdiction of the said cause.

Wherefore said William H. Smith prays this court that the
30 judgment and the orders of the said circuit court of the United States for the eastern district of Wisconsin be reversed and the cause remanded to the said court, with directions to render judgment for costs against the said Benjamin Selleck and remand the said cause to the circuit court of Door county, Wisconsin.

WILLIAM H. SMITH,
By LYSANDER HILL, *His Att'y.*

Bond for Costs on Writ of Error.

Know all men by these presents that we, William H. Smith, as principal, and Delia A. Lampard, as surety, of Oshkosh, in the State of Wisconsin, are held and firmly bound unto Benjamin Selleck in

the full and just sum of two hundred and fifty dollars, to be paid to the said Benjamin Selleck, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of April, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court between William H. Smith, plaintiff, and Benjamin Selleck, impleaded with Nathaniel B. Selleck, a judgment was rendered against the said William H. Smith for costs, and the said William H. Smith having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Benjamin Selleck, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington on the 25th day of May next:

Now, the condition of the above obligation is such that if the said William H. Smith shall prosecute his writ of error to effect
31 and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. SMITH, [SEAL.]
By E. A. SHERBURNE,
His Att'y-in-fact.
DELIA A. LAMPARD. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—

JAS. G. JENKINS, *U. S. Judge.*

Apr. 27, 1893.

STATE OF WISCONSIN, } ss:
Winnebago County, }

I, Delia A. Lampard, of Oshkosh, in the State of Wisconsin, the surety named in the within and foregoing bond, being duly sworn, do depose and say that I am an unmarried woman, am a resident and freeholder in the State of Wisconsin; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property exempt from execution.

DELIA A. LAMPARD.

Subscribed and sworn to before me this 22 day of April, 1893.

S. PALMER,
[L. S.] *Notary Public, Win. Co., Wis.*

32 *Opinion of the Court.*

Circuit Court of the United States, Eastern District of Wisconsin.

WILLIAM H. SMITH
vs.
BENJAMIN SELLECK.

This action was brought in the circuit court of the county of Door on the 9th day of June, 1884, upon an agreement made by Benjamin Selleck and N. B. Selleck, executed on the 3rd of February, 1874. On the 1st of September, 1884, the defendant, Benjamin Selleck, who was the only one of the two defendants served in that suit or that has appeared to the suit, filed his petition in the State court for the removal of the cause into the Federal court for this district. The record, as sent by the clerk of the State court, shows that that petition asserted that the defendant, Benjamin Selleck, is a citizen of the State of Connecticut; that the plaintiff is and at the commencement of the suit was a citizen of the State of Illinois, and that Nathaniel Selleck is also a resident of the State of Connecticut. The cause was thereupon removed into this court and proceeded in this court and was therein pending for several years before its trial, and after trial and verdict in favor of the defendant, Benjamin Selleck, the plaintiff moved to set aside the verdict and to remand the cause to the State court, upon the ground that the court never acquired jurisdiction by reason of the defective petition. There was afterwards a motion by the defendant, Benjamin Selleck, to file in this court an amended return by the clerk of the State court, showing that an imperfect copy of the original petition filed in the State court had been sent here; which motion was allowed. That amended return shows that the original petition stated that Benjamin
33 Selleck is and at the commencement of the suit was a citizen of the State of Connecticut, and that the plaintiff is and at the commencement of the suit was a citizen of the State of Illinois, and that Nathaniel Selleck, who has been pleaded with the petitioner, is also a resident of the State of Connecticut.

The complaint in the action states that Benjamin Selleck and Nathaniel B. Selleck are citizens of the State of Connecticut. As the record came to this court, the petition did not show jurisdiction under the decisions of the Supreme Court of the United States unless jurisdiction could, as I think it could, be helped out by the averments of the complaint. The amended return shows jurisdiction as to Benjamin Selleck and as to plaintiff. The question remains whether it shows jurisdiction as to Nathaniel B. Selleck and whether it is necessary to show such jurisdiction.

I am of opinion that the record shows jurisdiction as to Nathaniel B. Selleck, because the complaint alleges that he at the time of the complaint was a citizen of the State of Connecticut, and I think the complaint speaks from the commencement of the action. I doubt whether it is essential in such a case as this, where the litigation is

simply between the plaintiff and the defendant who has been served and who has appeared to the case, to show that another person named as defendant and who has not appeared to the case was a citizen at the time of the action or at any other time of a State other than that of which the plaintiff is a citizen. If that were essential, it would be a very easy matter for a plaintiff to defeat the removal of any cause into a Federal court by naming as a party defendant, in connection with the other defendants, one who, by reason of his citizenship, could not remove the cause into a Federal court. The parties to the action are the ones whose citizenship is to be inquired of, and one is not a party to an action who has not been
34 served with process and who has not appeared to the action.

I am therefore of opinion that the motion to remand must be denied.

35 UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a transcript of record in the case of William H. Smith *vs.* Benjamin Selleck, impleaded, &c.

Seal U. S. Circuit Court, Eastern District Wisconsin.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 11th day of May, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 117th.

EDWARD KURTZ, *Clerk.*

36 UNITED STATES OF AMERICA, ss:

Seal U. S. Circuit Court, Eastern District Wisconsin.

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between William H. Smith, plaintiff, and Benjamin Selleck and Nathaniel Selleck, defendants, a manifest error hath happened, to the great damage of the said William H. Smith, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if

judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 25th day of May next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 117th.

EDWARD KURTZ,
Clerk U. S. Circuit Court, Eastern District of Wisconsin.

37 UNITED STATES OF AMERICA, *ss:*

[SEAL.] To Benjamin Selleck, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 25th day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein William H. Smith is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable James G. Jenkins, circuit judge of the United States for the seventh judicial circuit, at the city of Chicago, this 27th day of April, A. D. 1893, and of the Independence of the United States the 117th.

JAS. G. JENKINS,
U. S. Circuit Judge.

I accept service of this citation this 11th day of May, A. D. 1893.

J. V. QUARLES,
Att'y for Def't, Benjamin Selleck.

Endorsed on cover: Case No. 15,324. E. Wisconsin C. C. U. S. Term No., 236. William H. Smith, plaintiff in error, *vs.* Benjamin Selleck. Filed May 20, 1893.

Term No. 236. Gen. No. 15,2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1894.

WILLIAM H. SMITH,
Plaintiff in Error,
vs.
BENJAMIN SELLECK,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

LYSANDER [illegible],
P. A. SHERBURNE,
Solicitors for Plaintiff in Error.

[illegible] & Miller Printing Co., Chicago.

Term No. 236. Gen. No. 15,324.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

WILLIAM H. SMITH,
Plaintiff in Error,
vs.
BENJAMIN SELLECK,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

LYSANDER HILL AND
E. A. SHERBURNE,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BANNARD & MILLER, PRINTERS, CHICAGO.

Term No. 236. Gen. No. 15,324.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1895.

WILLIAM H. SMITH,
Plaintiff in Error,
vs.
BENJAMIN SELLECK,
Defendant in Error.

In Error to the Circuit Court of the United States, for the Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

IF THE COURT PLEASE:

Plaintiff in error, in June, 1884, brought an action in the Circuit court of Door county, Wisconsin, against defendant in error and Nathaniel B. Selleck on a written agreement.

The complaint was filed in the office of the clerk of the Door county Circuit court on August 12, 1884, and avers that the defendants "are citizens of Connecticut."

Defendant in error was served with process on September 1, 1884, and (in apt time) he filed in the office of the clerk of that court a petition, in which he states that "he is, and at the commencement of this suit was a citi-"zen of the State of Connecticut, and that the plaintiff "is, and at the commencement of this suit was a citizen

"of the State Illinois; that said Nathaniel Selleck, who "has been impleaded with this petitioner, is also a *resi-* "*dent* of the State of Connecticut"; that the action is brought to establish "the liability of defendants to pay "a note of $2,500; that the matter in dispute exceeds "the sum of $500"; that the next regular term of said cout, to be held on the Tuesday after the first Monday of September, 1884, is the first term at which said cause could be tried; that it has not been tried, and "your "petitioner herewith presents a bond with good and suf- "ficient surety for the entering at the next term of the "Circuit court of the United States for the Eastern dis- "trict of Wisconsin, a copy of the record in the above "entitled cause," etc.

The prayer of the petition is as follows: "Where- "fore your petitioner prays this court to accept said peti- "tion and bond, and to *proceed no further in this ac-* "*tion*, pursuant to the provisions of the acts of Con- "gress in this behalf."

BENJAMIN SELLECK.

Sworn to on the 16th of August, 1884 (*fifteen days be-fore* it was filed).

Neither the petition or bond were presented to the state court, nor was that court asked to do anything whatever in the matter. But the clerk of that court sent copies of the papers which had been filed in the case, to the United States Circuit court for the Eastern district of Wisconsin, and attached to said copies the following certificate:

TITLE OF THE CAUSE.

STATE OF WISCONSIN, } ss.
DOOR COUNTY. }

I, Allen Higgins, clerk of the Circuit court in and for said county, do hereby certify, that the annexed and foregoing are true copies of *all papers* and *pleadings* which have been filed in my office *in the above entitled* cause, and the same are hereby transmitted to the clerk of the Circuit court of the United States for the Eastern district of Wisconsin, "pursuant to the *direction of the attorneys for the defendant*, Benjamin Selleck." No "copy of the *record*" of the State court was transmitted to or "entered" in the United States court. Thereupon defendant in error filed in the United States court his answer, after which plaintiff in error moved the United States court to remand the cause to the State court for want of jurisdiction, for the reasons stated in the assignment of errors. The motion was overruled, and a trial had, which resulted in a verdict for the defendant. Thereupon the plaintiff in error moved the court to set aside the verdict and remand the cause to the State court, for the same reasons urged in the first motion. This motion was also denied and judgment given for the defendant for costs, and the plaintiff has brought the case, and asks that the judgment be reversed and the cause remanded to the Circuit court, with directions to render judgment for costs against the defendant in error and remand the cause to the State court, and the plaintiff assigns for error:

1. That the Circuit court erred in overruling the motions to remand because that court never had jurisdiction of the action for the following reasons, to wit:

a. No petition for "removal" of said cause from the state court to the United States court was ever presented to or filed in the state court.

b. The so-called "petition for removal" was never presented to the state court, nor was any action asked or taken thereon by the state court.

c. No bond was presented to the state court as required by the act of congress, nor was any opportunity given the state court to approve or disapprove of or to accept or reject the so called bond which was filed by the defendant in the office of the clerk of state court.

d. The so called bond had no *surety* named therein. (See p. 8 of record.)

e. The *citizenship* of the parties to said action at the time of the commencement thereof and *at the time* of the filing of the petition was not shown either in the petition nor elsewhere in the record, as required by the act of Congress.

f. The citizenship of the defendant, Nathaniel B. Selleck. *at the time of filing the petition* is not shown, either in the petition or elsewhere in the record.

g. The record shows that this is an action against two defendants on a *joint* liability; that both were *necessary* parties to the action and but one of them had joined in said petition.

h. No "copy of the record" of the state court was ever entered in the United States court.

ARGUMENT.

I.

No petition "for the removal of the cause to the Circuit court of the United States," or for the "*removal*" of the cause *anywhere* was filed.

The law, paragraph 3, act of 1875 (in force in 1884 when this attempt to remove this cause was made), says: that the party desiring such removal may make and file "a petition" * * * "*for the removal* of such suit into the Circuit court." Now turn to the petition (p. 16 of transcript) and after the recitals we find the following: "wherefore your petitioner prays this court to accept said petition and bond and *to proceed no further* "*in this action* pursuant to the provisions of the Act of "Congress in that behalf.

(Signed) BENJAMIN SELLECK."

Can it be held that a petition to "proceed no further" in a cause is a petition "for the *removal* of such cause to the Circuit court of the United States"?

II.

Neither the petition or bond were ever presented to or called to the attention of the state court, all the defendant did was to deliver them to the clerk of the state court, and the clerk, "pursuant to the direction of the *attorneys* for the defendant," transmitted them with copies of the other papers in the case to the clerk of the United States court, and the state court was given no

more voice in the matter than this court has in deciding where counsel shall "put up" when they come to Washington. Such acts, it is respectfully submitted, do not constitute a "removal" of the cause.

In *Scott* v. *Otis* (10th Chicago Legal News, 41), U. S. Circuit court, District of Iowa (in 1877), a party desiring to remove a cause did exactly what was done in this case and, on motion to remand, Judges Dillon and Love held the cause was not removed. The same was held under similar proceedings by Judge Gresham in *Shedd* v. *Fuller*, 36 Fed. Rep., 609. I think the language of the Supreme Court of Georgia in *Carswell* v. *Schly*, 59th Ga., expresses the correct principle on this point. The court said: "In *Armory* v. *Armory*, 95 U. S., 186, the Supreme court of the U. S. distinctly recognizes the right of the State court to look into the petition for removal and compare it with the statute. Such a right must exist of necessity. When the court in which a case is pending is called on to yield its jurisdiction on statutory conditions, said to appear on the face of certain documents presented to it, it must inspect the documents and determine whether the conditions appear or not. How else is it to know whether to retain the case or to part with it? Whether to grant the application or to refuse it? Whether to treat the case as still pending or out of court? The scheme of removal, ordained by Congress is open and public. It is by petition. It contemplates a taking with leave, and not furtively by a sort of statutory larceny. The State court is to *know* of the proceedings for removal, and to see that they are such as the act prescribes. When they conform to the act the court has no right or power to retain the case; and when

they fail to conform in any essential particular it has no right or power to send the case away or order it removed. Until there is a sufficient petition there can be no transfer; and whether or not the petition, reading it in connection with the record is sufficient, can and ought to be decided, in the first instance by the court whose duty it is to accept it. The acceptence or rejection of the petition involves a decision upon its sufficiency. The laws of the United States are the laws of every state, and are to be administered by the state courts no less faithfully than their own local enactments. All acts of Congress that speak constitutionally should be obeyed without hesitation or reluctance; they are part of our supreme law. As ultimate questions, what they mean and how they are to be administered, are for decision by the Federal judiciary; but this does not relieve the state tribunals from taking their due part in construction and administration Conflicting constructions need not be anticipated. On the contrary, the presumption is that the statutes which are common to two governments will be understood by the tribunals of both to utter the same voice."

III.

The act of Congress requires a bond with "*surety.*" There is no surety named in the bond. It reads: "We, Benjamin Selleck, of Danbury, Connecticut, and ——— ———, of ———, are held and firmly bound," etc.

IV.

The *citizenship* of the parties to said action *at the time of the filing of said petition*, was not shown, either in the petition nor elsewhere in the record.

The petition says that said Benjamin "is and at the commencement of this suit was a citizen of the State of Connecticut, and that the plaintiff is, and at the commencement of this suit was, a citizen of the State of Illinois; that said Nathaniel B. Selleck, who has been impleaded with this petitioner, *is* also a *resident* of Connecticut. This is not sufficient; "residence" and "citizenship" are not synonymous terms.

Parker v. *Overman*, 18 How., 137.
Continental Ins. Co. v. *Rhoads*, 119 U. S., 237.
Menard v. *Goggin*, 121 U. S., 253.

But the learned Circuit judge who decided this case seeks to avoid this by saying (see opinion—22 of transcript): "I doubt whether it is essential in such a case as this, where the litigation is simply between the plaintiff and the defendant, *who has been served and appeared* to the case, to show that *another person named as defendant* and who *has not appeared*, was a citizen at the time of the action, or at any other time, of a state other than that of which the plaintiff is a citizen. If that were essential it would be a very easy matter for a plaintiff to defeat the removal of any cause into a federal court by naming as a party defendant in connection with the other defendants one who, by reason of his citizenship, could not remove the cause into the federal court. The parties

to the action are the ones whose citizenship is to be inquired of, and one is not a party who has not been served with process, and who has not appeared to the action."

As a part of the answer to this argument of the learned judge I desire to remind this court of its declaration in *Bors* v. *Preston*, 111 U. S., 255, *M. C. & L. M. Ry. Co.* v. *Swan*, 109 U. S., 283, oft repeated in other cases that "as the *presumption all the time* is, now, as well "as before the 14th. Amendment, that a cause is "*without* its jurisdiction unless the contrary appear "affirmatively, it is essential that, in cases where jurisdiction depends upon the citizenship of the parties, "that such citizenship, or the facts which constitute it, "should be *distinctly and positively* averred in the "pleadings, or should appear *affirmatively* with equal "distinctness in other parts of the record. It is not "sufficient that jurisdiction may be inferred *argumentatively* from the averments."

I also desire to call to the attention of this court that the record of this case shows that there was never any copy of the *record* of the State court "entered in the United States court." (See bottom of p. 9 of transcript) where the clerk of the State court certifies that "the annexed and foregoing are true copies of all *papers* and *pleadings* which have been filed in my office in the above entitled cause, and the same are transmitted to the clerk of the Circuit court of the United States, pursuant to the *direction of the attorneys for* the *defendant, Benjamin Selleck*," not a word about the "*record*" of the State court, and for aught the learned judge who pronounced the foregoing opinion knew, the other defendant, might have entered his appearance and confessed his liability in the cause in open court weeks before the "papers and plead-

ings" were "transmitted;" for the court will see, by reference to the transcript (pp. 8 and 10) that seventeen days elapsed between the filing of the petition and the certificate of the clerk. So that instead of saying as the judge did that Nathaniel B. Selleck has "*not* appeared to the case," it would have been more accurate had he said "there is no record of the proceedings of the state court here, and, as there is no appearance by defendant Nathaniel B. Selleck found in the "copies of the files" sent here, I *argue* that he did not appear in the state court. But as we have already seen, it is not sufficient for diverse citizenship to appear "argumentatively." And as to its being "a "very easy matter for a plaintiff to defeat the removal "of any cause into a Federal court by naming as a party "defendant, in connection with the other defendants, "one who by reason of his citizenship could not so re-"move the cause," I reply that it would always be a "very easy matter" for the Federal court to tell from the pleadings whether any person so joined as a defendant was put in for the purpose of defeating the jurisdiction of the Federal court; and if the court saw that he was a mere nominal party, his presence would not impede the attaching of the proper jurisdiction. In this case the defendants, Benjamin and Nathaniel B. Selleck, were sued on a contract in writing, wherein they covenanted jointly that, in consideration of the conveyance to them of certain lands, they would assume and pay certain incumbrances (amounting at the time of beginning of the suit to more than $5,000), and that Nathaniel B. Selleck was not only a proper, but necessary party, and a failure to include him in the action would have been cause for demurrer to the complaint. It is a joint cause

of action, and if it were true that only one of the defendants was served, or appeared, it is still joint, and is not made several by one of the defendants appearing alone.

Pirie v. *Tvedt*, 115 U. S., 41–43.
Smith v. *Rines*, 2d Sumner, 348.
Louisville, etc., R. R. Co. v. *Ide*, 114 U. S., 52.

If judgment shoujd be rendered in this cause against the defendant, Benjamin, it must, under the statute of Wisconsin, be in *form* against both of the defendants, and execution may be enforced thereon against the joint property of *all;* but can only be enforced against the separate property of the defendant served, or appearing.

Revised Statutes of Wis., Sec. 2,884.
Merwin v. *Weixel*, 49 Howard Pr. Rep., 116.

But there is another thing on the question of citizenship to notice. The petition was signed and sworn to on the 16th day of August, 1884, and states that said Benjamin "*is*" and at the commencement of this suit was a citizen of the State of Connecticut;" it was not filed in the office of the clerk of the State court until September 1, 1884, so that at the time of filing the petition he might have been a citizen of Wisconsin or any other state and still the petition have been true." This court in *Gibson* v. *Bruce*, 108 U. S., 561; *Stevens* v. *Nichols*, 130 U. S., 230; *Jackson* v. *Allen*, 132 U. S., 27; *La Confience* v. *Hall*, 137 U. S., and other cases therein cited, (too numerous to mention here), it was held that an allegation in a petition that a party "is," or that parties "are" citizens of a state, does *not* allege the citizenship of the said party or parties, except at its *date*"? I suppose it may properly be

added that, if the paper be not dated and is filed, it would be held to speak as of the date of its *filing*. I have studied the cases on removal from the beginning to the present, and, if there is anything "*settled*," it is that, in deciding the question of jurisdiction, particularly when it is invoked on the ground of citizenship, every *intendment* and *presumption* is *against* the jurisdiction of the United States courts, until the *contrary* is *affirmatively* and *positively* shown in the record. That "is" and "are" do *not* refer to, nor are they ever construed to cover or refer to any other time than the *present*. That an averment that a party "is" a citizen of Connecticut in a paper signed and sworn to on the 16th day of August, 1884, will *not* be construed as an averment of such citizenship at *any other time*, either before or after.

The United States courts are not alone on this question of the *time* to which a paper is held to refer, in cases where the jurisdiction depends upon the citizenship, or residence of the parties or party. The statute of Michigan provided that an attachment might issue on the plaintiff filing an affidavit that the defendant "resides out of this state and has not resided in this state within three months immediately preceding the time of making application for the attachment." In *Drew* v. *Dequndre*, 2d Douglas (Mich.), 93, the clerk issued an attachment on an affidavit that "the defendant *does* not reside in this state, and has not resided therein for three months immediately preceding the making of this affidavit." The affidavit was sworn to on the 10th day of June; on the 12th of the same month the writ was issued. On motion to quash, the court held that the writ was void, and said: "The defendant might have been a non-resident on the 10th and a resident on the 12th." In *Arnold*

v. *Wilson*, 5th Mich., 98, an attachment had issued on the 22d of January, 1849, on the presentation to the clerk of two affidavits, one of them sworn to on the 6th of the same month, and the other on the 18th of that month, each making, substantially, the same allegation as to residence as the affidavit in the Drew case. Again the court held the writ void, and for the same reason. The same was again held on a similar state of facts, in *Fessenden* v. *Hall*, 6th Mich., 242.

It is therefore respectfully submitted that the Circuit court of the United States failed to acquire jurisdiction of this case:

1. Because no petition for "removal" of the cause was filed in the State court.

2. Because no bond with "surety" was filed in the State court.

3. Because neither bond or petition was ever presented to or called to the attention of the State court.

4. No copy of the *record* of the State court in this suit was ever "entered" in the Circuit court of the United States.

5. The citizenship of the parties to said action at the time of the commencement of the suit, and at the time of filing the petition is not shown; and for these reasons the judgment and orders of the Circuit court of the United States should be reversed and the cause remanded to said court, with directions to render judgment for costs against said Benjamin Selleck, and remand the case to the Circuit court of Door county, Wisconsin.

LYSANDER HILL,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 236.

WILLIAM H. SMITH,
Plaintiff in Error,
against
BENJAMIN SELLECK,
Defendant in Error.

In Error to the Circuit Court of the United States, for the Eastern District of Wisconsin.

BRIEF FOR DEFENDANT IN ERROR.

J. V. QUARLES,
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BRIEF FOR DEFENDANT IN ERROR.

This cause was commenced in the Circuit Court of Door county, in the state of Wisconsin, to recover upon the stipulations of a certain contract alleged to have been made by and between one L. M. Griswold, party of the first part, and the defendant in error, Benjamin Selleck, and one Nathaniel B. Selleck, parties of the second part, in which it is alleged that the said Benjamin Selleck and Nathaniel B. Selleck had agreed to assume and pay to the plaintiff in error the sum of $2,550, according to the terms of a certain promissory note executed by the said L. M. Griswold to plaintiff in error.

The summons was issued against Benjamin Selleck, the defendant in error, and Nathaniel Selleck. It was served June 9, 1884, on Benjamin Selleck, but returned "not found" as to Nathaniel. (Record, p. 2.) No service was ever had, personally or otherwise, upon Nathaniel B. Selleck, and he has never appeared in the action.

The defendant in error, Benjamin Selleck, having appeared by counsel, the complaint was served upon such counsel on the 8th day of July, 1884, (Record, p. 6), in accordance with the state practice.

Both the summons and complaint were filed in the office of the clerk of the Circuit Court of Door county, August 12, 1884. (Record pp. 2-6.)

The first paragraph of the complaint is as follows: "The above named plaintiff, by Myron A. Baker, his attorney, complains of *Benjamin Selleck and Nathaniel B. Selleck, who are citizens of the state of Connecticut*, and says:" (Record, p. 2.)

A copy of the contract sued upon is attached as an exhibit to the complaint, and made a part thereof.

The first paragraph of this contract is as follows: "This agreement, made and entered into this 3rd day of February, 1874, between L. M. Griswold and Anna T. Griswold his wife, of the city of Chicago, county of Cook and state of Illinois, party of the first part, *and Benjamin Selleck and N. B. Selleck, of Danbury, Connecticut*, by W. B. Selleck, of Kenosha county, Wisconsin, their attorney in fact, party of the second part, witeesseth:" (Record p. 3.)

On September 1, 1884, the defendant in error filed in the office of the clerk of the court of Door county, his petition for the removal of the cause to the Circuit Court of the United States for the Eastern District of Wisconsin, on the ground of diverse citizenship, together with a bond as required by law. This petition was sworn to by the defendant in error, August 16, 1884. (Record pp. 7-10.)

In pursuance of this petition, the clerk of the Circuit Court of Door county, on September 17, 1884, transmitted copies of all the papers and pleadings in the case to the clerk of the Circuit Court of the United States, and the case was duly docketed in said court. (Record pp. 9-10

October 7, 1889, plaintiff in error moved to remand the case to the Circuit Court for Door county, which motion was, on October 12, 1889, overruled. (Record, p. 12.)

The case was tried in November, 1892, and a verdict rendered for the defendant. (Record, p. 13.)

After verdict and before judgment and on the 15th day of March, 1893, the plaintiff in error again moved to remand the cause to the Circuit Court of Door county. (Record, p. 13.)

Neither motion specified the grounds upon which it was based, but it was claimed before the court below that the requisite diversity of citizenship did not appear in the record at the time of removal.

In the copy of the petition for removal first transmitted by the Clerk of the Court of Door county, the allegation of the citizenship of the parties reads as follows: "The petition of the defendant, Benjamin Selleck, above named, respectfully shows that he is a citizen of the state of Connecticut, and that the plaintiff is and at the commencement of this suit was a citizen of the state—Illinois; that the said Nathaniel Selleck, who has been impleaded with this petitioner, is also a resident of the state of Connecticut." (Record, p. 7.)

Pending the hearing of the second motion to remand the cause, counsel for defendant in error moved the court for leave to file a corrected copy of the petition for removal *nunc pro tunc*, as of the 6th day of October, 1884, and that the record of removal be corrected to accord with the fact and to correspond with the record actually made in the Circuit Court of Door county. (Record, p. 14–16.)

This motion was granted, and thereupon the defendant in error filed a corrected copy of his petition for removal, in which it is alleged that the defendant Benjamin Selleck "is *and at the commencement of this suit was*, a citizen of the state of Connecticut, and that the plaintiff is and at the commencement of this suit was a citizen of the state of Illinois; that the said Nathaniel Selleck, who has been impleaded with this petitioner, is also a resident of the state of Connecticut." (Record, p. 16.)

The words italicized above show the correction made, they having been omitted by the Clerk of the court of Door county from the copy first transmitted, though appearing in the original petition filed in his office.

The corrected copy of the petition for removal having been filed, the court, on April 10, 1893, overruled the motion to remand, and judgment was entered in favor of defendant in error, April 20, 1893. (Record p. 18.)

To reverse this judgment, this writ of error has been sued out.

The principal error assigned is that the citizenship of the parties does not sufficiently appear to warrant removal or give jurisdiction to the United States Court.

It is also alleged that the petition for removal and bond were not presented to or acted upon by the state court, and that the bond filed is defective in that the surety is not named in the body of it. (Record pp. 19-20)

ARGUMENT.

I.

The record shows that the petition of defendant in error and his bond were filed in the office of the clerk of the Circuit Court of Door county, September 1, 1884; (Record pp. 8-91); that said clerk transmitted copies of all papers in the case on file in his office to the clerk of the United States Circuit Court, September 17, 1884; (Record p. 9-10); and that the latter court took jurisdiction of the cause.

It is well settled that it is not necessary that the state court should take any action upon a petition for the removal of a cause; if a petition presenting a proper case for removal and a suitable bond are filed, the jurisdiction of the state court at once ceases, it becomes its duty to transmit the papers to the United States Court, and the latter court at once acquires jurisdiction. No order of the state court is required.

Ins. Co. vs. Dunn, 19 Wall., 214.
Kern vs. Huidekoper, 103 U. S., 485.

Should the state court refuse or fail to transmit the papers, the removing party may file copies in the United States Court, and that Court will have full jurisdiction; and if the clerk of the state court refuses to give copies, he may be compelled to make return of the record by certiorari. Section 7, Act of 1875, (18 Stat. 470,)

II.

It was not error for the Court to permit defendant in error to file a true copy of the petition for removal. The Court always has power to allow or to compel the correction of its records to conform to the facts.

R. S., Sec. 954.
In re Wight, 134 U. S., 136-142, *et seq.*
Whiting vs. Eq. L. A. Soc., 60 Fed. Rep., 197.

It was not an amendment of the petition, setting forth a ground for removal not previously stated, or even stating more fully a ground defectively alleged, and therefore the cases of

Crehore vs. R. R. Co., 131 U. S., 240, and
Jackson vs. Allen, 132 U. S., 27

are inapplicable.

III.

The fact that the name of the surety was omitted from the body of the bond is immaterial; the bond was signed by the surety and the justification shows that he signed in that capacity. A suit will not be remanded on account of informalities in the execution of the bond.

Deford vs. Mehaffy, 13 Fed., 481.
Harris vs. Delaware, etc., R. Co., 18 Fed., 833.
Chambers vs. McDougal, 42 Fed., 694.

IV.

It was not necessary that Nathaniel B. Selleck should join in the application for removal or that his citizenship should be made to appear.

Process was never served in any manner upon Nathaniel B. Selleck but was returned "not found" as to him, (Record, p. 2) and he has not appeared.

The action being upon a joint contract, at common law the plaintiff could not have proceeded against the defendant in error alone, but Sec. 2884 R. S. Wis., S. and B., Ed. authorizes the plaintiff in such cases to proceed against the party served and take judgment in form against all defendants jointly indebted, which judgment may be enforced against the joint property of all and the separate property of those served. This statute reads:

"Section 2884. When the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against several persons, jointly indebted upon a contract, he may proceed against the defendant served, unless the court shall otherwise direct, and if he recover judgment it may be entered in form against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served,

and if they are subject to arrest, against the persons of the defendants served.

2. In any action against defendants severally liable, he may proceed against the defendant, or defendants served, in the same manner as if such defendant or defendants were the only parties proceeded against.

3. If all the defendants have been served, judgment may be taken against any, or either of them, severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them, or any of them alone."

Under this statute it would seem to be still necessary that a suit upon a joint contract should be brought in form against all who are jointly liable, but the effect of the statute is to render those who are not served with process merely formal parties.

That this is so is manifest from the rulings of the Supreme Court of Wisconsin upon applications for change of venue.

It is the settled rule in that state that a change of venue cannot be had on the application of a portion of the parties on the same side of the controversy but only when asked by all.

Rupp vs. Swineford, 40 Wis., 28.
Levy vs. Martin, 48 Wis., 198.
Zeller vs. Martin, 84 Wis., 4.
Holm vs. Colman, 89 Wis., 233.

But the Court holds that in an action against two, on a joint liability, where one defendant is not served and has not appeared, a change of venue should be granted on the application of the defendant served.

Eldred vs. Becker, 60 Wis., 48.
Wolcott vs. Wolcott, 32 Wis., 63.

No service having been made on Nathaniel B. Selleck, the controversy before the state court was, as it has since remained, one solely between the plaintiff and defendant in error; and, as the cases above cited show, in determining the place of trial, the suit should be regarded as if brought against the defendant in error alone.

In harmony with this view, it has been held by the U. S. Circuit Courts in Pennsylvania and Massachusetts, that the fact that persons not competent to remove are named as defendants, if they are not served with process, is no obstacle to the removal of a suit by those defendants who are served.

McHenry vs. N. Y. P. & O. R. Co., 25 Fed. Rep., 67.
Ex Parte Girard, 3 Wall., Jr., 263.

The same ruling has been made by state courts in cases like that at bar.

Davis vs. Cook, 9 Nev., 134.
Norton vs. Hayes, 4 Denio., 245.

Under the Wisconsin statute, above quoted, Nathaniel B. Selleck was at most but a formal party, and this court has repeatedly held that in determining the right of removal, or the question of jurisdiction in original cases, depending upon citizenship, only the real parties between whom the litigation exists will be regarded.

Wood vs. Davis, 18 How., 467.
Walden vs. Skinner, 101 U. S., 588, *et seq.*

There can be no question that the allegations of the petition as to the citizenship of plaintiff in error and defendant in error are sufficient. The cause was therefore rightly removed whether the citizenship of Nathaniel B. Selleck sufficiently appeared or not.

V.

If, however, the citizenship of Nathaniel Selleck is material, it is sufficiently shown by the record.

It is well settled that it is not necessary that the citizenship of the parties should be alleged in the petition for removal, if it sufficiently appears elsewhere in the record.

Steamship Co. vs. Tugman, 106 U. S., 118.
Bondurant vs. Watson, 103 U. S., 281.
Removal Cases, 100 U. S., 457.
Robertson vs. Cease, 97 U. S., 646.
Railway Co. vs. Ramsey, 22 Wall, 322.
Water Co. vs. Keyes, 96 U. S., 202.
Chambers vs. McDougal, 42 Fed. Rep., 694.